On the contrary if federal law or regulations made by the Yang Dipertuan Agung under clause (5A) of article 144 empower a C.P.O. to dismiss a constable, the C.P.O. may validly dismiss him, even if the C.P.O. is not empowered to appoint a constable. The words 'notwithstanding the provisions of clause (1) of article 135' in that clause are the authority for that proposition. But for these words, the C.P.O. may not validly dismiss unless he is empowered to appoint also.

These words appear also in clause (5A)(i) of article 144, so that a board appointed by the Yang Dipertuan Agung under that clause may validly dismiss a member of the service who is within the jurisdiction of the P.S.C. or the Education Service Commission, though the board is regarded as subordinate to the P.S.C. or E.S.C. and has no power to appoint an officer of equal rank."

On the authority of the case I have just cited, it is my judgment that, in the absence of the power to appoint, the purported dismissal of the plaintiff by the Chief Police Officer, Selangor was therefore in violation of Article 135(1) of the Constitution and was therefore void.

In consideration the plaintiff's claim must necessarily succeed. As the purported dismissal of the plaintiff was void and of no effect, it is my judgment that the plaintiff has to be reinstated effective from the date of the purported date of dismissal. He shall be entitled to the salaries and emoluments due to him from the date of the reinstatement.

The Government of Malaysia shall pay the plaintiff's costs.

Order accordingly.

Solicitors: *G. T. Rajan.*

MADHAVAN NAIR & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) April 15, 1975]
[Kuala Lumpur — Miscellaneous Criminal Application No. 33 of 1974]

Constitutional Law — Reference to High Court on effect of provision of Constitution — Condition imposed on licence for public meeting — Ban on reference to sensitive issue — Whether infringing right of free speech — Validity of condition — Interpretation Act, 1967, s. 40 — Police Act 1967, s. 27 — Federal Constitution, art. 10.

Police — Powers of police to impose condition on licence for public meeting — Police Act, 1967, s. 27.

Courts of Judicature Act, 1964, s. 30 — Construction of.

The applicants had been charged with contravention of a condition of a licence to convene a public meeting, that is, that no reference should be made to the results of the M.C.E. examination and the status of Bahasa Malaysia as the national language of the Federation. Counsel for the applicants had argued that the condition imposed was *ultra vires* article 10 of the Federal Constitution. The learned magistrate decided to refer the matter to the High Court.

Held: (1) if the condition imposed had contravened article 10 of the Federal Constitution, it was clear that no such condition could be imposed;

(2) in this case, however, the condition was not in contravention of article 10 of the Federal Constitution and therefore the police had powers under section 27 of the Police Act, 1967, to impose the condition.

Cases referred to:-

(1) *In re Article 143, Constitution of India* A.I.R. 1951 S.C. 332.

(2) *Harishankar Bagla & Anor.* v. *State of Madhya Pradesh* A.I.R. 1955 S.C. 380.

(3) *R.* v. *Comptroller of Patents, Ex parte Bayer Products Ltd.* [1941] 2 K.B. 306.

(4) *Francis* v. *Chief of Police* [1973] A.C. 761.

CRIMINAL REFERENCE.

Karpal Singh for the applicants.

Lamin bin Haji Yunus (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: This is a reference by the learned magistrate at Petaling Jaya to the High Court under section 30(2) of the Courts of Judicature Act No. 7 of 1964 to determine the following question: —

"Whether the officer-in-charge of Police District may by virtue of the powers conferred upon him by section 27 of the Police Act 41/67 to issue licences for public performances, impose a condition on the said licence which contravenes Article 10 of the Federal Constitution of Malaysia."

She came to this idea in the course of the trial when learned counsel for the accused suddenly submitted that the condition that was imposed in the permit was *ultra vires* Article 10 and that the matter should be referred to the High Court to decide whether it was in fact *ultra vires*. She then decided to transfer the proceedings to the High Court for the High Court to decide.

Section 30 of the Courts of Judicature Act reads as follows: —

"30. (1) Where in any proceedings in any Subordinate Court any question arises as to the effect of any provision of the Constitution the presiding officer of such court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to a High Court under this section shall be examined by a judge of such High Court and where such judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 48 of this Act as if it were a case before him in the original jurisdiction of the High Court in which such a question had arisen.

(3) Subsections (1) and (2) of this section shall be deemed to be rules of court for purposes of Clause (2) of Article 128 of the Constitution."

On the proper construction of this section it seems to me with respect that when any question as to the effect of any provision of the Constitution arises in a trial in any Subordinate Court the presiding officer, the magistrate or the president, has a discretion to stay the proceedings and transmit the record to the High Court. The purpose of the transmission to the High Court is by subsection (2) to enable a judge of that court to examine the proceedings and it is only when he considers that a decision of the question is necessary for determination of the proceedings that he deals with the case in accordance with section 48, that is, he deals with it in the original jurisdiction of the High Court, stays the proceedings and awaits a decision of the question by the Federal Court.

I do not however think that any useful purpose would be served by remitting the case to the learned magistrate to follow the procedure laid down and I accept the suggestion of learned counsel for the applicants to consider the matter.

Put in the way it was, the question admits of only one answer. It is an unequivocal no. Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 Clauses (2), (3) and (4) of the Federal Constitution cannot be valid. But that was, of course, not the purport of the exercise brought before me. It was to strike out a particular condition.

Briefly, in his submission, learned counsel for the applicants submitted that the particular condition, which is condition 14 of the permit, was beyond the powers of the officer in charge of a police district under section 27 of the Police Act to impose. This permit was applied for and issued to the first accused to allow him to convene a political rally. At this rally speeches were expected to be delivered and it was in respect of these speeches that this particular condition was laid down. The condition reads: —

"Tajuk syarahan tidak boleh menyentoh perkara-perkara berhubong dengan keputusan M.C.E. dan kedudukan Bahasa Malaysia sebagai Bahasa Resmi mengikut Perlembagaan Negara."

The exact translation is as follows: —

"The substance of the speech should not touch on matters relating to the M.C.E. results and the status of Bahasa Malaysia as the official language as laid down in the Federal Constitution."

The charge against the first applicant was that being the person issued with the licence to convene the meeting, he contravened a condition of the said licence, to wit, Condition 14, when a speaker the second applicant spoke on the issue of the M.C.E. results. I pause to query whether this charge had been correctly framed. The charge against the second applicant was that he contravened this condition by speaking on the issue of the M.C.E. results.

In view of these charges, and as I understood counsel, I take the objection of the applicants to be directed to the first limb of this Condition 14.

Learned counsel for the applicants conceded that the freedom of speech guaranteed in Article 10 was not absolute but was qualified. He accepted the statement of the learned author of "An Introduction to the Constitution of Malaysia" by Tan Sri Mohamed Suffian (at page 182) that:

"Freedom of speech, assembly and association

Article 10 provides for freedom of speech, assembly and association. It is to be noted that the rights conferred are not absolute and are restricted only to citizens.

Every citizen has the right to freedom of speech and expression. But Parliament may by law impose restrictions it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any state Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

The Constitution was recently amended by the Constitution (Amendment) Act, 1971, Act A30, effective from March 10, 1971 to make it seditious or (if Parliament makes law to that effect) criminal of any one questioning any rights and privileges etc. established or protected by those constitutional provisions relating to citizenship, to the national language and the use of other languages for non-official purposes, to quotas for Malays and natives of Borneo and the protection of the legitimate interests of other communities, and to the sovereignty of the Rulers. It would not, however, be seditious or criminal if any one were to question not the substance of those rights and privileges, but only the implementation of those constitutional provisions."

He admitted that the O.C.P.D. had powers under section 27 of the Police Act to regulate the conduct in public places of assemblies and meetings but contended, as I understood him, that while such a police officer might correctly refuse a permit, he must, if he issued one when he was satisfied that the meeting was not prejudicial to the interests of the country or was not likely to excite a disturbance of the peace, limit the conditions in the permit to the name of the licensee and certain administrative conditions for the holding of such a meeting. These administrative controls were suggested by him to be limited in the terms of section 27(1) to the place of the meeting, the route, the persons attending, the vehicles used and the route taken, and the time at which such assemblies or meetings might be held. On this restricted interpretation of section 27(1) he contended that the restriction of speech on the particular topic was in breach of the fundamental guarantee of freedom of speech. He conceded that under clause 2(a) of Article 10, Parliament might by law impose restrictions, *inter alia*, to provide against incitement to any offence but he contended that under section 27(1), the O.C.P.D. had no powers to go outside these topics. He went further to suggest, as I heard him, that the Police could refuse a permit, but once a permit was granted, it could not contain any restriction not specifically covered by clause 2(a). No cases were cited in support of these arguments.

By way of answer, learned Senior Federal Counsel relied on the doctrine of the delegation of powers. If section 27 was regarded as delegating the legislative powers which remained with Parliament, the section was not *ultra vires* the Constitution since the Police remained at all times subordinate to and subject to the over-riding directions of Parliament. He however contended that section 27 delegated the executive powers vested in the Government and therefore the O.C.P.D. was empowered to impose the condition objected to. The authorities he cited and relied on were *In re Article 143, Constitution of India*,[1] and *Harishankar Bagla & Anor.* v. *State of Madhya Pradesh*.[2]

With the greatest of respect, learned Senior Federal Counsel might with equal effect have relied on section 40 of the *Interpretation Act*, No. 23 of 1967, where it was provided that —

"40. (1) Where a written law confers power on any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

(2) Without prejudice to the generality of subsection (1) —

(a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby the control or regulation might be evaded;

(b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted; and

(c) where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith."

He would have found here statutory authority for much of his arguments.

But with great respect, the question was not whether it was within the powers of the O.C.P.D. to impose this condition. It was whether the condition he imposed did or did not infringe the fundamental right of free speech.

I think it is very necessary to begin with a consideration of what is meant or intended by this condition. It is, read carefully, a ban on speaking about the results of the Malaysian Certificate Examination. There is, so far as I can see, no restriction on speaking about the examination itself. The restriction is as to the results. Now it ought to be realised that this examination is nothing more or less than the school leaving examination or the General Certificate Examination to which is tagged a language paper. The language is Bahasa Malaysia or the national language. Any candidate who passes the other subjects or such subjects of the examination as would ordinarily have entitled him to a General Certificate but fails in the Bahasa language paper is given not a certificate but a mere statement of his results. He is not entitled to a Malaysian Certificate of Education. Speaking on the results of this examination, which must necessarily be adversely, must therefore be on the use of Bahasa Malaysia and not on the implementation of the policy of making Bahasa Malaysia the national language.

The right to freedom of speech and expression, as well as the right to assemble peaceably but without arms and to form associations, guaranteed in Article 10 of the Federal Constitution is however subject to clauses (2), (3) and (4) of the same Article. In clause (2)(a), in connection with the freedom of speech there is reservation to Parliament within the Constitution to impose such restrictions "as it deems necessary or expedient in the interest of the security of the Federation ... public order or morality" and "further restrictions designed ... to provide against ... incitement to any offence."

The background of the law relating to the matter before me is as follows: In Emergency (Essential Powers) Ordinance, No. 45 of 1970, an Ordinance promulgated by the Yang Dipertuan Agung under Article 150(2) of the Federal Constitution, the Sedition Act 1948, *inter alia*, was amended. It henceforth became a seditious tendency —

"(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution."

To make for better clarification, the same Emergency Ordinance amended sub-section (2) of section 3 of the Sedition Act. It now reads:

"(2) Notwithstanding anything in sub-section (c), an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency...

(a) ...

(b) to point out errors or defects in any Government or Constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) otherwise than in relation to the implementation of any provision relating thereto....

(c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) —

(i) persuade the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government or by law established; or

(ii) to point out, with a view to their removal, any matter producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation,

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency."

Subsequently on the restoration of Parliamentary rule, by Constitutional (Amendment) Act 1971, with effect from March 10, 1971, a new clause, Clause (4) was added to Article 10 of the Constitution. It reproduced the definition of a seditious tendency in section 3(1)(f) of the Sedition Act in these words:

"Clause (4): In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause 2(a), Parliament may pass law prohibiting the *questioning of any matter*, report, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181, otherwise than in relation to the implementation thereof as may be specified in such law."

The operative words will be seen to be "the questioning of any matter...."

Of the three Articles mentioned, Article 152 is the only one relevant. It establishes the Malay Language, or Bahasa Malaysia, as the national language of the Federation.

This is the law as it stands today. Even a cursory reading of the law must show that in respect of those issues enumerated in paragraph (f) of section 3(1) of the Sedition Act, the same issues spelled out in Clause (4) of Article 10 — the so-called sensitive issues — questioning of them even for the purpose of pointing out errors or defects in the Constitution which would by section 3(2)(b) save all other seditious tendencies would not save this particular one. By section 3(2)(c), even though the purport is to persuade the subjects to change the law by peaceful or lawful means or to obtain the change by pointing out the undesirability of such sensitive issues, it is still a seditious tendency to speak on these subjects as topics of questioning.

In the background of this law, the officer-in-charge of the particular police-district in exercise of his powers under section 27 of the Police Act made it a condition of the permit to hold the rally that there should be no comments on the M.C.E. results.

With respect, I take the view that the attack on this condition can only succeed if the condition itself is seen as an infringement on the freedom of speech within the limits set on this fundamental right in clauses (2), (3) and (4) of Article 10.

As to this, there can be and there was no claim that Parliament was not empowered by the Federal Constitution to make such an amendment to the Sedition Act or that the Sedition Act was not lawfully amended by a sufficient and valid legislative act. Clause 2(a) speaks of restrictions deemed "necessary or expedient in the interest of the security of the Federation" and restrictions "designed ... to provide against incitement to any offence." Where such entirely

subjective words have been used, it is not within the competency of the courts to question the necessity or expediency of the legislative provision.

There is a fair number of authorities on this point. I need refer to only one:

In *R.* v. *Comptroller of Patents — ex parte Bayer Products Ltd.*[3] it was held that if a regulation is expressed to have been made because it appeared to His Majesty in Council to be necessary to secure, *inter* alia, the public safety, the defence of the realm and the maintenance of public order, the court had no jurisdiction to investigate the reasons which impelled His Majesty to the conclusion that it was necessary or expedient to make the regulation or to enquire whether the making of the regulation was in fact necessary or expedient to effect any of the specified purposes.

The conclusion seems to me therefore to be that the definition of "seditious tendency" in section 3(1)(f) of the Sedition Act is not *ultra vires* the Constitution or beyond the powers of Parliament to enact and that touching on the M.C.E. results is a validly imposed restriction on the freedom of speech.

Mr. Karpal Singh for the applicants had a further contention. He argued that a man should be allowed to determine for himself what he would speak on and he would do so at his own peril. If he should transgress the laws of sedition, he ran the risk of being charged in court but he should never be subject to control by the Police.

With respect, this contention seemed to me to deny the necessity to prevent incitement to any offence and to safeguard the security of the country and to preserve public order.

The question whether Parliament might not decide for itself the appropriate authority for determining the conditions of a licence came up before the Privy Council in the case of *Francis* v. *Chief of Police*[4] on appeal from the Court of Appeal for St. Christopher, Nevis & Anguilla. The appellant was charged with using a loudspeaker during a public meeting without permission of the Chief of Police, contrary to section 5 of The Public Meetings & Processions Act, 1969. It was contended that section 5 providing for control of loudspeakers at public meetings was *ultra vires* the Constitution because it curtailed the freedom of communication guaranteed by section 10 of the Constitution which in substance is *in pari materia* with our Article 10 without clause (4). Both the High Court and the Privy Council decided that the provision was not *ultra vires* the Constitution. In the judgment of Their Lordships delivered by Lord Pearson, it was said at page 772 that—

"Whatever may be the exact construction of section 10, it must be clear that (1) a wrongful refusal of permission to use a loudspeaker at a public meeting (for instance, if the refusal is inspired by political partiality) would be an unjustified and therefore unconstitutional interference with freedom of communication, because it would restrict the range of communication, and (2) some regulation of the use of loudspeaker is required in order that citizens who do not wish to hear what is said may be protected against 'aural aggression' if that might reach unbearable intensity.

As some regulation of 'noisy instruments' is required, and a system of licensing is the natural method, there must be some licensing authority to grant or refuse the permission. The legislature of the state concerned has decided that the Chief of Police is the suitable officer to be given this power and duty. There is convenience in that choice, as he is concerned with the preservation of public order and knows the prevailing conditions affecting it and therefore to be able to give a quick decision. There is no evidence and no reason to infer that he has abused the power or would be likely to abuse it in any way. It is reasonable to assume that the legislature, knowing the local conditions, made a suitable choice of licensing authority."

For myself I do not conceive it possible to sustain any argument that a general ban on touching on the sensitive issues as spelled out makes for partiality or that in imposing the ban laid down by law or seeking to enforce it in a permit issued to an applicant is leaning against it.

The final question is whether section 27 of the Police Act empowers the O.C.P.D. to impose this ban, because it does not expressly refer to it. Whether or not it might have been better to have some expression defining his powers in relation to these sensitive issues, he as the proper licensing authority is not without guidance. As the officer-in-charge of a police district and the appointed licensing officer, it becomes his duty in issuing such licences to preserve, at the same time, public order in and the security of the district in particular and the country at large, and clearly this he can best do by prevention rather than by detection.

In my view, the O.C.P.D. has powers under section 27 to impose condition 14.

I now remit the case to the learned magistrate to try the case according to the law.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

MARIYAYEE & ANOR. v. NADARAJAN

[O.C.J. (Abdoolcader J.) June 9, 1975]
[Ipoh — Civil Suit No. 366 of 1972]

Damages — Fatal accident involving cyclist and motorist — Negligence — Claim on behalf of deceased's family — Whether posthumous child entitled to claim relief as dependant — Interest on general damages — Civil Law Act, 1956, ss. 7, 8 and 11.

The plaintiffs brought an action on behalf of the estate and dependants of the deceased who sustained fatal injuries in an accident involving a bicycle ridden by the deceased and a motor car driven by the defendant on June 29, 1972, in Gopeng Road, Ipoh. On that day, the deceased was riding his bicycle from the direction of Ipoh towards Gopeng when a collision took place near the 1st milestone at Gopeng Road between his bicycle and a motor vehicle owned and driven by the defendant and proceeding in the same direction. The deceased left a widow and four infant children including a son born posthumously on whose behalf the plaintiff claimed for special and general damages.

Held: (1) on the balance of probabilities, the defendant was negligent and wholly liable for the collision in which the deceased died;

(2) the posthumous child was entitled to claim relief as a dependant and in the circumstances an allowance of $20 a month for his support was fair and proper;

(3) general damages in the sum of $21,600 plus interest at 6% per annum should be awarded to the deceased's widow and children.